IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 916 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA
and
Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

YAKUB MOHAMMED BAX

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 916 of 1998

MR YU MALIK for Petitioner No. 1-3
MR MA KHARADI for Petitioner No. 1,2,3
MR MM TIRMIZI for Petitioner No. 1,2,3
MR JM PANCHAL for Petitioner No. 1,2,3
MR KT DAVE, APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA
and
MR.JUSTICE M.S.SHAH

Date of decision: 26/03/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 7.9.1998 passed by the learned Additional Sessions Judge, Bharuch in Sessions Case No. 92 of 1997 convicting all the three appellants herein for the offences punishable under Section 302 read with Sections 147, 148 and 149 IPC and also for the offence punishable under Section 135 of the Bombay Police Act and sentencing to rigorous imprisonment for life and fine of Rs.500/- in default simple imprisonment for 30 days in so far as the offences punishable under the IPC are concerned, and also sentencing the appellants to simple imprisonment for 10 days and fine of Rs.100/- in default simple imprisonment for 7 days for the offence under the Bombay Police Act and also ordering both the sentences to run concurrently.

2. All the three appellants were charged as per the charge-sheet (Exh. 4) to the effect that on 10.2.1997 at 10.00 in the morning, the three appellants alongwith two unidentified persons had formed an unlawful assembly with the common object of committing the murder of complainant Ibrahim Umarji Ahmad and Sarfraz Ibrahim Umarji and had entered the agricultural field of complainant Ibrahim Umarji and abused him and his son Sarfraz; appellant-accused No.1 had carried an axe, appellant-accused No.2 had carried an iron pipe and appellant-accused No.3 had carried an iron bar; accused No.1 had inflicted axe blows on both the legs of the complainant, accused No. 2 had inflicted iron pipe blows on the legs and hands of the complainant and accused No. 3 had inflicted a blow with the iron bar on the head of the deceased-complainant; on account of the said serious injuries, complainant-Ibrahim Umarji Ahmad succumbed to the injuries during treatment and the appellants had also assaulted Sarfraz, son of the complainant, who ran away to save his life. The appellants were also charged with the offence of carrying deadly weapons like axe, iron pipe and iron bar and had thus committed the breach of the notification issued by the District Magistrate. The appellant-accused pleaded not guilty and were tried for the aforesaid offences.

3. The prosecution case was that complainant-Ibrahim Umarji was a tenant of the agricultural land for which there were disputes raised by the owners of the land and although complainant Ibrahim had lost before the lower authorities, he had obtained interim stay from the Gujarat Revenue Tribunal in Revision Application No. BA. 12/97 on 29.1.1997, which was communicated by the complainant's advocate Mr Ibrahim A Patel of Bharuch to

accused No.2-Iqbal Mohammad Bax and others and that enraged by the said act of the complainant in obtaining such stay order, the three accused alongwith two unidentified persons had formed an unlawful assembly with the common object of committing the murder of the deceased-complainant and they had entered the agricultural field occupied by the complainant and his son on 10.2.1997 at 10.00 in the morning with the deadly weapons like axe, iron pipe and iron bar. They initially abused the complainant and his son and the two unidentified persons hold the complainant from the back and the three accused assaulted the complainant with the axe, the iron pipe and the iron bar and caused serious injuries to the complainant. The accused also turned to Sarfraz, son of the complainant, but to save his life Sarfraz ran away and hid himself under a bridge and as the accused could not find him and they went away, Sarfraz, after hiding himself about a half an hour, went back home and informed his mother and elder brother about the incident. The two brothers and two relatives residing in the same village went to the field where Ibrahim Umarji was lying with serious injuries on his body. They had to call for the ambulance from Bharuch and they shifted him to Bharuch Hospital at about 2.00 in the afternoon. The telephone wardi about the aforesaid incident was received by the Police Station Officer, Bharuch (Rural) at 2.20 PM. The police constable who reached Patel Welfare Hospital at Bharuch recorded the complaint of Ibrahim Umarji between 3.00 and 3.30 PM (Exh. 52). Complainant-Ibrahim Umarji mentioned the aforesaid facts of the prosecution case with a complaint which was recorded as narrated by Ibrahim Umarji and was written down by the police writer. Since Ibrahim Umarji was seriously injured, he could not put his signature on the said complainant (Exh. 52) and, therefore, his right hand thumb impression was taken on the said complaint. For further treatment, complainant-Ibrahim Umarji was taken to the Government hospital at Baroda at 6.15 PM on the same day and the complainant ultimately succumbed to the injuries at 7.30 PM on the same day, where post-mortem (Exh. 60) was done by PW 15 Dr Vijaykumar Rajnikant Shah.

4. As far as the investigation is concerned, PSI Pavar had reached the hospital at Bharuch at about 4.00 PM. He read the complaint recorded by the police constable and took Sarfraz to the agricultural field where the complainant was assaulted and after preparing the panchnama of the scene of offence, recorded the statement of Sarfraz, who was an eye witness to the incident.

5. At the trial, the prosecution examined PW 1 Sarfraz Ibrahim (son of the deceased), aged about 141/2 years, who was found to understand the significance of oath and his deposition was, therefore, recorded on oath at Exh.11. The prosecution also examined PW 2 Aminaben, widow of the deceased at Exh. 12, PW 5 Mohmedbhai Musabhai, brother-in-law (wife's brother) of the deceased-Ibrahim at Exh. 15 and PW 9 Khaliad Ibrahim, elder son of the deceased, aged 19 years at Exh. 26. PW 3 Jasiben (Exh. 13) and PW 4 Kapilaben (Exh. 14) were the agricultural workers who turned hostile at the trial and did not support their police statements about presence of the accused in the field with the deceased. The prosecution examined panch witness for the scene of offence being panchnama (Exh. 23), panch witness for the inquest panchnama at Exh. 25, panch witnesses for the discovery panchnama (Exh. 28 and 31), panchas for the panchnama of the clothes of the deceased at Exh. 32, panchas for the panchnamas of the clothes of the accused at Exhs. 33 and 34. The prosecution also examined PW 13 Dr Durgeshkumar Rai and PW 14 Dr Rajesh Parmar, the doctors who had examined the deceased at the Patel Welfare Hospital, Bharuch at Exhs. 39 and 41 respectively and PW 17 Dr Vijaykumar Rajnikant Shah, Medical Officer at the Government Hospital, Baroda (Exh. 59) who had performed the post-mortem of the deceased. The prosecution also examined PW 16 Rasikbhai Kalubhai, Police Station Officer at Makatampur Police Station in Bharuch District (Exh. 50), who had recorded the dying declaration of the complainant (Exh. 52) and Mr Pavar, the Investigating Officer at Exh. 66. The defence did not lead any evidence and their defence was that of complete denial even in the further statement under Section 313 of the Code of Criminal Procedure, 1973.

6. After hearing the arguments of both the parties, the learned Sessions Judge gave the finding that the oral evidence of the eye witness Sarfraz, son of the deceased, was reliable and so also the dying declaration of the deceased was also reliable and that all the three accused alongwith two other unidentified persons were guilty of the offences with which they are charged.

Hence, this appeal by all the three accused.

7. Mr YU Malik, learned counsel for all the three appellant-accused has made the following submissions :-

(i) The learned Sessions Judge has erred in relying upon the dying declaration at Exh. 52 of the

complainant though the same ought not to have been relied upon because the same is not attested by the Medical Officer at the Bharuch Hospital and also because the deceased was not in a position to give any such dying declaration in view of the serious injuries on his head and other parts of the body.

(ii) The learned Sessions Judge has also erred in relying upon the evidence of a child witness Sarfraz who was only 14 years old and who had been tutored by the relatives. His first statement was recorded by the Investigating Officer five to six hours after the incident and not immediately and, therefore, there was enough time and opportunity for the relatives of the deceased to tutor the said child witness.

(iii) The accused have been falsely involved in the offences as enmity is a double edged weapon and the dispute between the parties about the land in question was sufficient motive for the relatives of the deceased to falsely implicate the accused for the offences in question.

8. On the other hand, Mr KT Dave, learned Additional Public Prosecutor has supported the judgment under appeal and has submitted that deceased-Ibrahim Umarji was in possession of the agricultural land in question as a tenant under the Tenancy Act and although he had lost before the Mamlatdar and Deputy Collector, he had obtained interim stay from the Gujarat Revenue Tribunal in Revision Application No. BA.12/97 and that his grievance was that the Mamlatdar had not relied upon the documentary evidence showing lawful possession of the of the deceased as a tenant of the land in question. The power of attorney at Exh. 35 (pgs. 95 to 97) also clearly indicates that Usman Mohammed Bax, son of Mohammed Bax and brother of accused Nos. 1 and 2 was given the power of attorney by the landlords residing in England "to take possession of all our land and properties situated in District Bharuch, Gujarat, India and to manage and superintend the management of the same" and to make and effect all sales, purchases, etc. and also to fight all litigations etc. It was because the deceased was in possession of the land in question that the question of taking possession of such land by the landlords would arise. It is also submitted that the deceased was distantly related to the landlords residing in England and, therefore, the deceased was granted the land for cultivation. Reference is also made to the

orders passed by the Deputy Collector wherein the finding given by the Deputy Collector was that the deceased had not proved his possession over the land in question as a tenant and that the deceased-complainant made a grievance that the documentary evidence produced by him before the Mamlatdar was erroneously not considered by the Mamlatdar. The order of the Deputy Collector is at Exh. 36 and the interim stay order granted by the Gujarat Revenue Tribunal is at Exh. 38 alongwith the notice dated 5.2.1997 (Exh. 37) sent by Mr Ibrahim A Patel, Advocate of the deceased before the Gujarat Revenue Tribunal communicating the interim stay order of the Tribunal to accused No. 2-Iqbal Mohammad Bax and to Usman Mohammad Bax, power of attorney holder of the landlords and father of accused No.3.

It is submitted that soon after receiving the said notice sent by RPAD, the accused formed an unlawful assembly alongwith two other unidentified persons with the common object of committing murder of the deceased-complainant by assaulting him with deadly weapons like axe, iron pipe and iron bar. It is further submitted that the prosecution has examined the Medical Officers, Bharuch Hospital at Exhs. 39 and 41 who have opined that the complainant was conscious when he was admitted to the hospital, that the blood pressure of the complainant was 110/70 and pulse was 110 and further that the police officer who had recorded the complaint has been examined at the trial as PW 16 (Exh. 50) and that there is no reason why the said officer would make a false statement or record the declaration which was not made by the injured complainant. It is further submitted that the incident was witnessed by PW 1 Sarfraz, son of the deceased, and there is no reason why the son of the deceased-complainant would falsely involve the accused. It is further submitted that the deposition of the son of the deceased by itself is sufficient to sustain the conviction and the same is corroborated by the dying declaration of the deceased recorded by the police. It is further submitted that the dying declaration is also sufficient to sustain the conviction more particularly when it is corroborated by the oral evidence of the son of the deceased. It is further submitted that the documentary evidence, particularly the interim stay order granted by the Gujarat Revenue Tribunal on 29.1.1997 (Exh. 38) as communicated by advocate's notice dated 5.2.1997 (Exh. 37) sent by RPAD clearly explains the motive of the accused for assaulting the deceased and his son on 10.2.1997. It is, therefore, submitted that the appeal deserves to be dismissed.

9. Having heard the learned counsel for the parties, we are of the view that the prosecution has proved its case beyond reasonable doubt. The challenge to the evidence of Sarfraz on the ground that he is a child witness and that his evidence is the result of tutoring cannot be accepted. Sarfraz was 141/2 years old at the time of giving deposition and was 14 years old on the date of the incident. The fact that Sarfraz accompanied the deceased to the agricultural filed at 9 O'clock in the morning was quite natural and there is no reason to disbelieve Sarfraz when he stated that the deceased was assaulted by two unidentified persons who held him from the back and the three accused assaulted with deadly weapons like axe, iron pipe and iron bar. If the accused were not the real culprits, there was no reason for Sarfraz to allow the culprits to go scot free and falsely involve the three accused. The very fact that he could not identify the two unknown persons and stated so also clearly indicates that if the evidence of Sarfraz was tutored to falsely involve the three accused, Sarfraz could have as well given the names of two other persons related to the accused as members of the unlawful assembly.

The submission of Mr Malik for the appellant-accused that the statement of Sarfraz was recorded by the Investigating Officer five hours after the incident and that was the result of tutoring cannot be accepted for the simple reason that when deceased-Ibrahim was assaulted by five persons with deadly weapons like axe, iron pipe and iron bar and a number of injuries were inflicted on his body and head and even Sarfraz was chased by the accused and Sarfraz had to hide himself for half an hour is sufficient to show how scared Sarfraz must have been. It was only when he reached home and narrated the incident to his mother and elder brother and thereafter they went to the field where his father was lying, they had to call for the ambulance from Bharuch to this rural area and they had taken the deceased to the hospital at Bharuch for treatment. In this set of circumstances, the first priority of all the family members would be to give immediate urgent medical treatment to the injured family member who was first admitted to a hospital at Bharuch and then required to be shifted to the Government hospital at Baroda and a 14 year old boy would naturally take a few hours to recover from the shock caused from such a ghastly gruesome assault on his father. Hence, it cannot be said that there was any tutoring before the statement of Sarfraz was recorded by the Investigating Officer. In any case, the defence had not put any

question to the Investigation Officer in his cross to explain the time gap before recording the statement of Sarfraz.

10. We find no reason to disbelieve the testimony of Sarfraz who is the son of the deceased and a natural and reliable eye witness. The contention that Sarfraz is a child witness and, therefore, it is unsafe to rely on his testimony is required to be rejected in view of the fact that Sarfraz was 14 years old at the time of the incident and 141/2 years old at the time of his deposition before the Court and the learned Sessions Judge has held that Sarfraz was able to understand the significance of oath and administered oath. The lengthy cross-examination to which Sarfraz was subjected by the defence counsel clearly indicates that Sarfraz was a mature witness who had seen the incident and who clearly understood what he had seen and what he had stated before the Court. A few minor contradictions sought to be highlighted by the learned counsel for the appellant-accused are of no consequence as the learned Sessions Judge has himself stated in the judgment that the contradictions were of very minor points like one of the accused was stated to have assaulted the deceased with an iron pipe, but in his police statement Sarfraz had not stated that the said accused had kept the iron pipe in both the hands. Such minor omissions can never be used to discard the reliable testimony of the witness who is the younger son of the deceased and who is expected not to allow the real culprits to go scot free.

11. As regards the challenge to the dying declaration (Exh. 52), the same is also required to be rejected. As per the settled legal position, the dying declaration made by the injured complainant before the police officer is certainly admissible in evidence and can be relied upon to convict the appellants whose names are disclosed in the dying declaration. In the instant case, the deceased knew all the three appellant-accused very well as they have been fighting against the deceased about the land in dispute and they happened to be the brothers of the power of attorney holder of the landlords. The injured complainant was found to be in conscious condition as stated by the doctor in his deposition before the Court. There is no reason to disbelieve the police officer who had recorded the statement of the injured complainant between 3.00 and 3.30 PM on the date of the incident long before the complainant succumbed to the injuries at about 7.30 PM.

12. As regards the contention that the injuries on

the body of the deceased were so serious that he could not have given the declaration, it is required to be noted that the doctor who had examined him while admitting the injured complainant at the hospital at Bharuch at about 2.00 PM has clearly stated that the complainant was conscious. We see no reason to discard the statement (Exh. 52) which has been treated as the dying declaration.

13. As regards the contention that enmity was a doubled edged weapon, when we have held that the oral evidence of Sarfraz, son of the deceased as well the dying declaration at Exh. 52 are both important and reliable pieces of evidence and each of them is sufficient to sustain the conviction, in our view, it is not necessary to examine the question of motive, but even if it were necessary, the prosecution has clearly shown the motive for the murderous assault on the deceased-complainant who was a tenant fighting the litigation under the Tenancy Act and who had succeeded in obtaining the interim stay order from the Gujarat Revenue Tribunal.

14. In view of the above discussion, we find no merit in any of the contentions and accordingly the appeal is dismissed.

(B.J. Shethna, J.)

(M.S. Shah, J.)

sundar/-